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IN THE

Supreme Court of the United States

February Term, 1950.

No. 716-719

HERMAN FRANCIS HENDERSON, WILLIAM EDWARDS WILDMAN, RICHARD H. SHUFFLEBARGER and CHARLES FRANTZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Herman Francis Henderson, William Edwards Wildman, Richard H. Shufflebarger and Charles Frantz, pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit, which Court affirmed the decision and judgment of the United States District Court for the Southern District of Indiana. The District Court found each of these four young men (three Quakers and a Methodist) guilty of the crime of "unlawfully, knowingly and wilfully failing (ed) and refusing (ed) to present himself for and submit to registra-

tion" under the 1948 Selective Service Law when he advised his local draft board that *solely because of his religion* he could not register. The statute (50 U. S. C. App. 462) make any person who "evades or refuses registration or service in the armed forces or any of the requirements of this title" guilty of a crime punishable by 5 years imprisonment and a $10,000 fine. It is conceded that petitioners' religious position is sincere and that they could not further comply with the statute without violating their religion. Since they will not violate their religion, the effect of the convictions is to sentence them to prison for their religious faith. This threat to Freedom of Religion is one of the most sinister ever presented to this Court; it is not as trivial a matter as whether they will get a license before distributing literature; it is whether they will abandon their religion to stay out of jail.

Statement of Matters Involved.

At or prior to the time fixed by the President for registration of men in their age groups, each petitioner filed with his local board a letter giving his name, address and stating a desire to obey laws, an inability because of his religion to do any affirmative act toward registering, but containing no obstruction to the board, no evasion and no words of refusal to submit to registration. Three, and their parents, had been life members of historic peace churches (Quakers and Brethren), had been trained in peace church schools and had been brought up in and practiced the principles of these bodies. Each had an excellent reputation. The essential position of each was that he wanted to obey all laws; that war, preparation for war and registration therefor, were all contrary to God's law; that each was directed by his religion to follow God's law; that he did all he conscientiously could when he registered his

name, address and intentions with his draft board; and any law requiring a man to show approval of war training by registering or making it a crime to follow religious conscience invalidly infringed his religious right and itself lacked the basic requirements of a valid criminal law.

The evidence shows that defendants' position was fully in keeping with the religious principles and history of their religion; in fact it was restated to them by national representative conferences, and in some cases by their governing bodies, immediately before and after their alleged violation of law that the peace testimony was a central religious belief and that they must follow their conscience even to challenging law—and they based their action on this religious advice.

Although the plan of the statute and regulations required the Draft Board to register the men without their cooperation in giving information or signing their names, and the draft boards had frankly violated this obligation; the Court, prosecutor and draft officials never allowed the question of defendants' non-violation of the law to go to the jury, but kept referring to the obligation "to register" —the essence of their position being, "the registrant himself had to come in and sign his card." They were going to make him come in and disavow his religion whether this was necessary to the purpose of the law or not.

The judge completely took over the prosecution, asking questions and making statements: approximately 150 compared to the prosecutor's 65 in Frantz's case and 100 to the prosecutor's 120 in Henderson's. He stated repeatedly that defendants' admitted religious exhibits "had nothing to do with the case" or "don't mean a thing". He would not permit some of the exhibits to be read, nor any to be taken by the jury. He stated as facts his recollec-

tion of occurrences back in 1918 without being sworn as a witness and rejected contrary proof. He virtually took the question of fact from the jury and left no doubt that he expected a verdict of "guilty". In each charge the Judge stated substantially that the defendant had admitted his guilt; though it was clear that each defendant had denied guilt, attempted to prove lack of criminal intent, possible compliance with the law and a religious defense. The Judge, in the Frantz case, refused Dan West, a religious leader of the Church of the Brethren, the right to testify because he would not raise his hand though it is well known that Brethren have a testimony against swearing. In one of the cases the Judge, in the presence of the jury and over objection, improperly referred to another non-registrant conscientious objector who had been convicted a short time earlier. He denied requested charges that religious compulsion or necessity for a "test case" could be considered on criminal intent and wilfulness; that the "clear and present danger" test was applicable; as to the meaning of "appear" and "submit" in the statute.

The above denials of procedural due process are not set forth to relieve petitioners of conviction on technical grounds, but to show the unabated effort to deprive them of their religious rights.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 1254 of the U. S. C. (Judiciary and Judicial Procedure, Title 28, Ch. 646, Pub. Law 773, 80th Congress).

The judgment of the United States Court of Appeals, Seventh Circuit, to be reviewed was entered on February 27, 1950.

Questions Presented.

1. Is the 1948 Selective Service Act, and section 12(a) thereof unconstitutional, as applied to petitioners:
   a. As violating rights secured by the First Amendment and as failing to meet the test of "clear and present danger."
   b. As creating a federal militia contrary to the United States Constitution, Art. I, Sec. 8, Art. II, Sec. 2 and contrary to the rights of the States.
   c. As too indefinite and vague for a criminal law affecting rights under the First Amendment?

2. Do petitioners' convictions unconstitutionally deprive them of due process of law in violation of Amendments 5, 6 and 8 of the Constitution:
   a. In interpreting a statute merely requiring "submission" as requiring affirmative acts "to register", contrary to the intendment of the statute and the provisions of regulations adopted thereunder.
   b. In finding petitioners criminal without proof of criminal intent and expressly denying proof of religious compulsion and honest belief in unconstitutionality and desire for a "test case" as negativing such intent.
   c. In preventing any method of attacking the constitutionality of a law, of which there is considerable question under the decisions of this Court, without being imprisoned for the very act of asserting one's constitutional rights.
   d. In the denial of a fair trial by the acts and rulings of the trial judge.

3. Shall the Religious Society of Friends (Quakers) be declared illegal in the United States in 1950?

Reasons for Allowance of Certiorari.

Involved here is not merely these petitioners; involved is an old and, we hope, respected religious society—the Religious Society of Friends (Quakers). Whether that

Society is now to be declared illegal is a question so important that nothing less than a pronouncement of this Court is required.

Three of petitioners are members and the fourth is closely associated with Quakers, one of whose founders—William Penn—went to jail for his conscientious objection to war and founded Pennsylvania as a refuge for free conscience. This Court has said that the First Amendment is the product of that struggle:

> "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. *Freedom of religion guaranteed by the First Amendment is the product of that struggle.*" Girourard v. U. S. 328 U. S. 61, 68 (Ital. supplied).

These petitioners and many more Quakers will spend their lives in jail rather than give up their religion, a central tenet of which is complete opposition to war and all things related thereto. A national conference of Friends on July 22, 1948, immediately after the 1948 Selective Service Act and before registration, (see the record) enjoined upon its members:

> "Friends are exhorted to adhere faithfully to this testimony against all wars and fighting, *and in no way to unite with any warlike measure such as a selective Service Draft or Universal Military Training,* to the end that we may convincingly demonstrate a more excellent way of settling conflicts • • •
>
> "A living concern having been expressed that Friends' *practices be consistent with their professions,* Friends are urged:
>
> "1. To support Young Friends and others who express their *opposition to conscription either by non-registration,* or by registration as conscientious objectors. *We warmly approve civil disobedience under Divine compulsion* as an honorable testimony fully in keeping with the history and practices of Friends."

Petitioners' arguments are clear and direct: A person must follow his religious principles and is protected in so doing by the First Amendment, and to require a person to show approval of war contrary to his religion is to violate the First Amendment. No clear and present danger justifies this curtailment of defendants' religious liberty. Defendants have no criminal intent; they have only a commitment to obey God and a desire to protect their right so to do and test a law which infringes that right.

2. *The decision of the Court below is in conflict with the applicable decisions of this Court.*

a. Free exercise of religion guaranteed by the First Amendment is a defense to criminal prosecution.

The lower courts refused to permit freedom of religion as a defense—the trial court on the assumption that religion was *never* a defense to criminal action, the Circuit Court on the misapprehension that petitioners demanded an "absolute" right and that when this Court in a footnote (319 U. S. 624 at 642) referred to the right to restrict freedoms of those *in* the military service it intended to restrict *civilians'* freedoms at the point of draft. This is contrary to such decisions as:

West Virginia v. Barnette, 319 U. S. 624;

Taylor v. Mississippi, 319 U. S. 583, and other (particularly Jehovah's Witness) cases with which this Court is familiar.

Other First Amendment rights are proper defenses to criminal prosecution:

Terminiello v. Chicago, 337 U. S. 1;

Winters v. New York, 333 U. S. 507, and other recent free speech and free press cases of this Court.

The only allegedly religious acts which this Court has allowed to be punished as crimes are polygamy and human sacrifice. This Court has itself distinguished these practices from acts similar to conscientious objection to draft registration: (1) polygamy and human sacrifice result in bodily harm to persons other than the government, (2) polygamists seek to do an affirmative act, here petitioners seek not to be coerced to believe or act, (3) polygamy and human sacrifice are contrary to the basic Judeo-Christian culture of our country—"we are a Christian country", whereas refusal to participate in war preparation cannot be foreign to the way of "the Prince of Peace":

> Reynolds v. U. S., 98 U. S. 145 (polygamy case), distinguished Regina v. Wagstaff, 10 Cox Crim. Cases 531 wherein nonfeeding of a child was deemed inaction whereas the Mormon "offense consists of a positive act."
>
> Mormon Church v. U. S., 136 U. S. 1, 49 (polygamy): "The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World."
>
> West Virginia v. Barnette, 319 U. S. 624, 632 (flag salute): "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual * * * The sole conflict is between authority and rights of the individual."

The decision of the Circuit Court in this case gives the lie to the opinion of this Court:

> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can pre-

> scribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." West Virginia v. Barnette, 319 U. S. 624, 642.

It is generally accepted that coercion by another negatives criminal intent. Surely, acting in the fear of God can be as real a compulsion (and Quakers have been advised to so act *only* "under Divine compulsion") and negative criminal intent as effectively as acting in fear of physical harm:

> Respublica v. McCarthy, 2 U. S. 86;
>
> People v. Schmidt, 216 N. Y. 324, 330-7 (an insane religious delusion as to God's requiring murder as a defense);
>
> West Virginia v. Barnette, 319 U. S. 624.

Holland, which has no "freedom of religion" constitutional provision has nevertheless found that a conscientious objector *in military service* cannot be Court Martialed for a crime of refusing to don a uniform where his defense is God's will, saying:

> "The accused must be considered as having committed the act accepted above as proved, driven thereto by *force majeure* * * * and therefore not punishable and should be acquitted of that with which he is charged." Matter of Fethus van Lieshout, Peace News, March 11, 1949.

The history surrounding our constitutional adoption, the representations by the States, the various drafts of the First Amendment, the early interpretations in Congress, show that "free exercise of religion" guaranteed by the First Amendment included the right of conscientious objection to military preparation and renders unconstitutional any Selective Service Act infringing the right of such religious objection except to the extent permitted as to all "freedoms" under the clear and present danger test.

(See material reviewed in briefs submitted to this Court in Everson v. Bd. of Education, 330 U. S. 1 and on petition for certiorari in Wirt A. Warren v. U. S., Oct. term, 1949).

At a time when our prosecutor at Nurnberg demanded that men follow moral guidance even to extent of violating national law; at a time when we have inserted in the Constitution of Western Germany an express protection of religious objection to military service in Art. 4(3); at a time when this Court requires the naturalization of an absolutist conscientious objector in Martin Coehnstadt v. U. S., Feb., 1950, when even section 6(J) of the 1948 Selective Service Act recognizes that religion "involves duties superior to those arising from *any* human relation," it ought not to be held that the ancient position of Quakers is illegal.

b. The trial and Circuit Court refused to apply the "clear and present danger" test, and if the test were properly applied the convictions here involved could not be sustained.

It is conceded that the major claim of these defendants has, from the beginning, been that "free exercise of religion" guaranteed them by the First Amendment is improperly infringed by the 1948 Selective Service Act, as applied. Petitioners did not claim an "absolute right"; they claimed protection under the clear and present danger test which this Court has always demanded. The trial court refused a proper request for instructions on clear and present danger; the Circuit Court never mentioned clear and present danger. Petitioners are entitled to have this Court review the judgment of Congress and Selective Service and possibly overrule it, as this Court has often done in protecting guaranteed freedom where the danger to paramount interests was much clearer, imminent and present than in this case:

Terminiello v. Chicago, 337 U. S. 1;
Taylor v. Mississippi, 319 U. S. 583;
United States v. C. I. O., 335 U. S. 106;
Bridges v. California, 314 U. S. 252;
Herndon v. Lowry, 301 U. S. 242;
Thornhill v. Alabama, 310 U. S. 88;
Carlson v. California, 310 U. S. 106;
West Virginia v. Barnette, 319 U. S. 624;
Justice Holmes and Brandeis in Whitney v. Calif., 274 U. S. 357, 375; Abrams v. U. S., 250 U. S. 616, 630; Gilbert v. Minnesota, 254 U. S. 325, 336.
Robert Cushman, "Clear and Present Danger in Free Speech Cases" in Essays in Political Theory (Cornell Press, 1948).

The lack of clear and present danger in these cases is the more apparent if the following are remembered:

(1) Petitioners did not "evade"; they wrote letters giving name, address, etc., to their draft boards.
(2) The draft boards were empowered and *required* to register these men, on such information, whether or not the men would actively cooperate, the board even signed their names to registration cards (S. S. Regs. 613.3; 642.31; 613.11).
(3) On May 26th, 1949 Attorney General Clark issued an order to all United States Attorneys that known religious objectors should be registered under the above provisions and "except in the most willful instances, indictments should not be brought in future cases of religious objectors who refuse to submit for registration." Petitioners were tried in August 1949.
(4) Under identically the above provisions these men have in fact been registered without their cooperation since conviction.
(5) In November 1949 the Army announced plans to release 30,000 draftees (all that were drafted) under the 1948 Selective Service Act, and several Senators, *e. g.* Senator Edwin C. Johnson, issued a press release that this "is positive proof that the present draft law never should have been enacted. It never

was necessary and I was convinced of it at the time but could not prove it." The current discussion over extension of the draft is known to this Court.

Where is the "clear and present danger"?

c. An honest belief that a statute is unconstitutional and a desire to test constitutionality is a defense to criminal action because it negatives criminal intent, when the only way to test the statute is by violating it in a manner stated by the statute to be criminal.

In Keegan v. United States, 325 U. S. 478, this Court required a directed verdict of acquittal where the reason why German-American Bund officials violated the Selective Service Act was their belief in its unconstitutionality. They violated the law to create a "test case." The case was followed in Okamoto v. United States, 152 Fed. 2d 905, Japanese-Americans in evacuation centers refusing to comply with Selective Service on the ground it was unconstitutional as applied to them while they were confined.

If we correctly interpret this Court's recent decision in District of Columbia v. Little, 70 S. Ct. 468 it carries out this same line of reasoning. Respondent there erroneously believed that the constitution gave her a right to demand a search warrant before a health officer could inspect her home; she therefore refused him entry. In holding that she should not be criminally punished as interfering with the officer, this Court said:

> "The right of privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than respondent did here."

d. Section 12(a) of the 1948 Selective Service Act is invalid as too indefinite for a criminal law.

The statute requires passive conduct—submission to registration. It has been applied to require active conduct—

"to register." The regulations (S. S. Regs. 613.3; 642.31; 613.11) excuse a registrant from doing affirmative acts such as signing his draft card, as the court below required, and the Court of Appeals for the Second Circuit (L. Hand, Swan and Clark) has so held in Norton v. U. S., Jan. 19, 1950. The statute is void:

Musser v. Utah, 333 U. S. 95;
United States v. L. Cohen Grocery Co., 255 U. S. 81;
Connolly v. General Construction Co., 269 U. S. 385;
Winters v. New York, 333 U. S. 507.

The statute as interpreted by the regulations is equally indefinite and void:

M. Kraus & Bros. v. United States, 327 U. S. 614.

e. The statute was not strictly construed as required by well established law.

Hartzel v. United States, 322 U. S. 680;
Viereck v. United States, 318 U. S. 236.

3. This case raises important questions of federal law which have not been, but should be, settled by this Court.

a. Shall the Religious Society of Friends (Quakers) be declared illegal in 1950?

The only religious practice ever prevented by this Court is polygamy. Polygamy was not an essential or central principle of the Mormon church, and only a small percentage of its members were supposed to or did practice it. It was a degrading practice, a "return to barbarism," a harm to other individuals. Yet it properly took a decree of this Court to condemn the practice:

Reynolds v. United States, 98 U. S. 145;
Davis v. Beason, 133 U. S. 333;
Mormon Church v. United States, 136 U. S. 1.

And this Court has since cast some doubt on the limit of these cases:

Musser v. Utah, 333 U. S. 95;
United States v. Ballard, 322 U. S. 78.

In the present cases, opposition to all war preparation is the center of Quakerism; this Court has spoken favorably of Quaker refusal to obey authority; reliance on love and opposition to violence is the center of Judeo-Christian culture; pacifism is an ennobling, not a degrading, religion. The national bodies of Quakers have encourged the acts of petitioners as essential to Quaker religion (see p. 6). These petitioners cannot be held guilty without wiping Quakerism from the American scene. This Court, and only this Court, should determine that issue.

b. Interpretation of section 12(a) of the Selective Service Act of 1948.

The 1940 Selective Service Act made the *evasion* of registration or the counselling of evasion a crime. This Court in Keegan v. United States, 325 U. S. 478 held that counselling "refusal" was not a crime. It did not state whether "refusal" could constitutionally be made a crime. Therefore, in view of the addition of the word "refuse" to the 1948 Selective Service Act, this is a case of first impression. Can mere "refusal" be made a crime?

In District of Columbia v. Little, 70 S. Ct. 468, March, 1950, this Court considered "refusal" as differing from "interference" or "evasion" and not to be a proper cause for criminal punishment in areas touching basic freedoms.

Neither the 1948 Selective Service Act nor the regulations thereunder made it an offense to *refuse* to sign a draft card or do other affirmative acts toward registration. Regulations expressly provided that if a registrant *refuse* to give information or *refuse* to sign his name, the Board shall get the information from other sources and shall sign

the registrant's name and complete the registration. The United States Court of Appeals, Second Circuit (L. Hand, Swan and Clark) in United States v. Norton, January 19, 1950 reversed a conviction, saying:

> "The regulation having provided a substitute for the registrant's signature we believe that the substitute was meant to serve for all purposes, including the condoning of the refusal * * * We conclude that the crime for which he was indicted was not proven."

c. Was the 1948 Selective Service Act Constitutional?

In Hamilton v. Board of Regents, 293 U. S. 245 at 265 this Court expressly left for later determination whether Congress had the power to conscript in time of peace. Three years ago, in 1947, this Court recognized its right to determine when peace existed as to any specific question and then deemed that war *in 1947* might be "pure fiction":

Ludecke v. Watkins, 335 U. S. 160;
Woods v. Clyde W. Miller Co., 333 U. S. 138.

There is respectable authority that we are now at a point where only the States, not the Federal government, have power to train the general manpower:

Constitution, Art. II, Sec. 2; Art. I, Sec. 8;
1 Elliot's Debates, 305; 5 Elliot's Debates, 130, 443-5, 464, 466;
United States v. Miller, 307 U. S. 174, 179;
Constitutionality of Peacetime Conscription, 31 Va. L. Rev. 40.

The Selective Service Act of 1948, so far as it relates to religious objectors, is unconstitutional as prescribing and establishing religion, in violation of the First Amendment. It provides that no person has a "religious belief" unless he believes in a "Divine Being." Most, if not all, of the Eastern religious have no Divine *Being* and Unitarianism goes far in this direction. The statute thus establishes

tests of orthodoxy and heresy, contrary to the decisions of this Court in:

United States v. Ballard, 322 U. S. 78, 86;
West Virginia v. Barnette, 319 U. S. 624, 642.

Wherefore your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding that Court to certify and to send to this Court on a day certain to be herein named, full and complete transcripts of the records and all proceedings had in these cases numbered and entitled on its docket, 9996, 9997, 9998, 9999, to the end that these cases may be reviewed and determined by this Court; that the said judgments of the United States Court of Appeals for the Seventh Circuit may be reversed by this Court; and that your petitioners may have such other and further relief in the premises as may seem just and proper. These four cases have been consolidated for argument on appeal by stipulation of counsel.

HERMAN FRANCIS HENDERSON,
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BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the United States Court of Appeals for the Seventh Circuit, Docket Nos. 9996, 9997, 9998, 9999 was entered on February 27, 1950 and is printed at the end of the records filed herein.

Jurisdiction.

Jurisdiction of this Court is invoked under Sec. 1254 of the U. S. C. Title 28.

Statement of the Case.

The Statement of the Case appears in our Petition and will not be repeated here.

Specification of Errors.

The Court of Appeals erred in ruling against Petitioners on each of the issues set forth in their petition.

Statutes and Regulations Involved.

The pertinent provisions of the 1948 Selective Service Act and the Regulations thereunder are set forth at the end of this Brief.

Argument.

As the petition has pointed out, the substantial question here involved is whether the Religious Society of Friends

(Quakers) will in 1950 be declared illegal, in spite of the guarantee of the "free exercise of religion" in the First Amendment to the Constitution. One may attempt to avoid the issue by saying that only the conviction of four defendants is before the Court. But these defendants, if they violated a law, admittedly did so only because of their religion. They had to do what they did *or* forswear the most central principle of their religion. It is in these records that their Religious Society, from the first utterance of its founder, George Fox, in 1660 to its national pronouncement in 1948 just before Petitioners took their position, has placed as central to Quakerism the refusal of any affirmative act toward war preparation or related to military preparation:

> "We utterly deny all outward wars and strife, and fightings with outward weapons, for any end, or under any pretense whatever; this is our testimony to the whole world * * * Therefore we cannot learn war any more."
>
> George Fox and Others, Declaration presented to Charles II, 1660.
>
> "Friends are exhorted to adhere faithfully to this testimony against all wars and fighting, and in no way to united with any warlike measure such as a Selective Draft or Universal Military Training, to the end that we may convincingly demonstrate a more excellent way of settling conflicts * * * We warmly approve civil disobedience under Divine compulsion as an honorable testimony fully in keeping with the history and practices of Friends."
>
> By a called Meeting representing Friends in the United States, held at Earlham College, Richmond, Indiana, July 20-2, 1948.

We do not believe that a Religious Society which founded one of the original colonies, furnished Presidents, Governors and Legislators, whom many credit with chief responsibility for the First Amendment, and whose practices

of civil disobedience this Court has referred to approvingly, should be declared illegal. If the 1948 Selective Service Act must be declared unconstitutional in its entirety in order to preserve religious freedom, then we answer, "so be it". Of the two—militarism or religious freedom—religious freedom is more essential to a democracy. But we believe that the 1948 Selective Service Act can be so construed as to prevent general *evasion* of military duty and at the same time protect religious freedom. Petitioners ask no more. This Court should protect no less.

Because of the number of cases cited in the Petition and the Civil Rights questions involved, which are most familiar to this Court, no further argument is presented here. Considerable material of which this Court would want to be informed in deciding the issues if Certiorari is granted, particularly as to the history of the Constitutional provisions, has been omitted.

We submit that both the legal and the social implications of the case require that this Court grant a Writ of Certiorari, and upon hearing of the issues, make its decision known.

Respectfully submitted,

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March 23, 1950.

ADDENDUM.

The Statute Involved.

Selective Service Act of 1948, Sec. 12(a), (462(a), Title 50, App. U. S. C. A.):

"(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (Sections 451-470 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall upon conviction in any district court of the United States of competent jurisdiction, be punished

by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *"

Section 6(j), Title 50 App. U. S. C. A. sec. 456 (j):

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code * * *"

Regulations Involved.

Regulation 613:3: "If the registrant is unable, or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word 'Registrar' beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if the registrant had signed his Registration Card (SSS Form No. 1), and such registrant shall thereby be registered."

Regulation 642:31: "a) Provided they are required and have not already been accomplished, the following steps shall be taken in connection with every man who has registered or who is required to register under the provisions of Title I of Selective Service Act of 1948 (50 App. 98) immediately upon his *reporting* to or being brought before a local board or immediately upon his being taken into custody or his being placed in confinement:

"(1) He shall be registered * * *

"(5) b) If such man is unable or refuses to fill out any form in the manner required by paragraph (a) of this section, such form shall be filled out by a member or clerk of a local board . . . from information gained by interviewing the delinquent and from other sources.

"c) If the signature of such man is required upon any form after it is filled out and he is unable or refuses to sign his name or make his mark upon any such form, a member or clerk of a local board . . . shall sign such man's name and indicate the name of such man."

Regulation 613.11 "(a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card, except when the registrant signs the completed card."

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 716

HERMAN FRANCIS HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 717

WILLIAM EDWARDS WILDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 718

RICHARD H. SHUFFLEBARGER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 719

CHARLES FRANTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 5-14) [1] is not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 27, 1950 (R. 14-17). The peti-

[1] Petitioners were tried separately, but their appeals were consolidated. The designation "R." herein will be used to refer to the joint record of the proceedings in the Court of

tion for writs of certiorari was filed on March 29, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the requirement of the Selective Service Act of 1948 that every male resident of the United States between the ages of 18 and 26 "present himself for and submit to registration" is unconstitutional as an unwarranted restriction upon freedom of religion if construed as applying to persons conscientiously opposed to participation in war and preparation therefor.

2. Whether a belief that a conscription law is morally wrong or a purpose to secure a judicial test of its validity is a good defense to a charge of violation of the law.

3. Whether the registration requirements of the Act are fulfilled by one who notifies his draft board by letter that he does not intend to register, but who refrains from personally appearing before the board.

STATUTES AND REGULATIONS INVOLVED

The Selective Service Act of June 24, 1948 (62 Stat. 604; 50 U. S. C. App., Supp. II, 451 et seq.), provides in pertinent part:

* * * * *

Sec. 3 [50 U.S.C. App., Supp. II, 453] Ex-

Appeals. The trial records, in four separate volumes, will be referred to by the designations "Henderson R.", "Wildman R.", etc.

cept as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder.

* * * * *

Sec. 6 (j) [50 U.S.C. App., Supp. II, 456 (j)]. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. * * *

* * * * *

Sec. 12 (a) [50 U.S.C. App., Supp. II, 462 (a)]. Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of

> the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *
>
> * * * * *

The pertinent provisions of the Selective Service Regulations (32 C.F.R., 1949 ed., chap. XVI) are as follows:

> § 1613.11 *Interview of the registrant.* (a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card (SSS Form No. 1) except when the registrant signs the completed card.
>
> * * * * *
>
> (c) The registrar shall ask the registrant for

the information necessary to complete the entries on lines 1 to 15, inclusive, of the Registration Card (SSS Form No. 1), and shall enter such information on the proper lines of the card. * * *

* * * * *

§ 1613.13 *Registrant's signature.* * * *

(b) The registrant shall then sign his name, exactly as he usually signs it, in the space on the Registration Card (SSS Form No. 1) provided for his signature. If he cannot sign his name, he shall make his mark, and the registrar shall then write in after the mark the words "The mark of ———————— made in my
(Name of registrant)
presence" and shall sign his own name thereunder, followed by the word "Registrar."

(c) If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card (SSS Form No. 1), and such registrant shall thereby be registered.

STATEMENT

In March 1949, each of the petitioners was charged in the District Court for the Southern District of Indiana with knowingly and wilfully failing

and refusing to "present himself for and submit to registration" before a duly authorized registration official or local Selective Service Board, in violation of Sections 3 and 12(a) of the Selective Service Act of 1948, *supra*. pp. 2-4 (Henderson R. 3; Wildman R. 1-2; Shufflebarger R. 1-2; Frantz R. 1-2).[2] Following trials by jury, petitioners Henderson, Wildman, and Frantz were found guilty (Henderson R. 60; Wildman R. 49; Frantz R. 52). Petitioner Shufflebarger waived a jury trial (Shufflebarger R. 4) and was found guilty by the court (*id.* 22). Each petitioner was sentenced to 90 days' imprisonment and to pay a fine of $100 (Henderson R. 73; Wildman R. 58-59; Shufflebarger R. 31-32; Frantz R. 60-61). Petitioners' appeals to the Court of Appeals for the Seventh Circuit were consolidated (R. 6) and the judgments of conviction were affirmed (R. 14-17).

The evidence in all four cases is undisputed. Three of the petitioners are members of the Society of Friends, sometimes called Quakers (Henderson R. 14-15; Wildman R. 13; Frantz R. 13); the fourth belongs to no religious sect (Shufflebarger R. 11). All profess to believe, on moral and religious grounds, that war is never justified; that conscription, being part of the process of preparing for war, is equally wrong; and that registration under a draft law, being the first step in the process of

[2] Wildman, Shufflebarger, and Frantz were indicted. Henderson, having waived prosecution by indictment (Henderson R. 4), was proceeded against by information.

conscription, is likewise morally unjustifiable (Henderson R. 61; Wildman R. 50-52; Shufflebarger R. 24; Frantz R. 54-56). At about the time he was required to register under the Selective Service Act of 1948 and the Presidential Proclamation[3] fixing dates for registering according to age groups, each petitioner wrote his draft board a letter outlining his religious objections to registration and advising the board that, because of those objections, he refused to register (*ibid.*). None of the petitioners registered on the day appointed or at any time thereafter (Henderson R. 62; Wildman R. 52-53; Shufflerbarger R. 25; Frantz R. 8-9).

ARGUMENT

1. Petitioners' principal contention is that the requirement of the Selective Service Act of 1948 that every male resident of the United States between the ages of 18 and 26 "present himself for and submit to registration" is unconstitutional as an unwarranted restriction upon freedom of religion if construed as applying to persons conscientiously opposed to participation in war and preparation therefor (Pet. 5, 9-10, 13-14, 18-19). The contention has the support, as remarked by the Court of Appeals, of "neither reason, nor authority" (R. 9).

The contention presumes that the constitutional proscription of any law abridging the free exercise of religion is absolute and unqualified; that it must

[3] Proclamation No. 2799, issued July 20, 1948, 13 F. R. 4173.

be read *in vacuo;* and that all other provisions of the Constitution are subordinated to it. But, as pointed out by the Court of Appeals (R. 9), the same Constitution which guarantees freedom of religion also gives Congress the power to "raise and support Armies," to "provide and maintain a Navy," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (Art. I, Sec. 8). And, obviously, as the Court of Appeals further observed (R. 9), "To raise an army Congress must necessarily have the power to take an inventory of and to classify the available manpower of the nation. *This is all that registration under the Act actually amounted to, so far as these defendants were concerned"* [Italics supplied].

The question involved here is not whether Congress could constitutionally compel military service by conscientious objectors to warfare in any form, for Congress has never sought to do so. Section 6(j) of the present Act, *supra,* p. 3, specifically exempts conscientious objectors from combatant service, and, indeed, even from noncombatant service if the conscientious objection extends to that type of service as well. But petitioners refused even to register—to be enrolled for classification purposes under the Act. Clearly, nothing in the First Amendment restrains Congress from imposing that requirement. *Warren* v. *United States,* 177 F. 2d 596, 598-599 (C.A. 10),

certiorari denied, 338 U.S. 947; *Baxley* v. *United States*, 134 F. 2d 937, 938 (C.A. 4); *Richter* v. *United States* (C.A. 9), not yet reported, decided April 5, 1950; cf. *Selective Draft Law Cases*, 245 U.S. 366; *Board of Education* v. *Barnette*, 319 U.S. 624, 642, n. 19; see also *Reynolds* v. *United States*, 98 U.S. 145.

It is urged, however (Pet. 10-12), that if religious liberty can ever be restricted by the requirement of registration in a program of military conscription, it can be done only where a "clear and present danger" warrants the restriction. But, as remarked by the Court of Appeals (R. 13), it is "evident that the need for raising an army must be a question to be left to the final decision of Congress." And Congress has declared, in Section 1(b) of the Act (50 U.S.C. App., Supp. II, 451(b)), that "an adequate armed strength must be achieved and maintained to insure the security of this Nation." This legislative judgment, "encased in the armor wrought by prior legislative deliberation," has always been recognized as carrying great weight in the application of the "clear and present danger" doctrine. *Bridges* v. *California*, 314 U.S. 252, 261; *Whitney* v. *California*, 274 U.S. 357; *Gitlow* v. *New York*, 268 U.S. 652.[4]

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[4] Petitioners' suggestion that Congress lacks the power to enact a conscription law "in time of peace" (Pet. 15) is based on an erroneous premise (see *Ludecke* v. *Watkins*, 335 U.S. 160), and is in any event plainly unsound. Congress' constitutional power to "raise and support Armies," to "provide and maintain a Navy" (Art. I, Sec. 8), and to "provide for

2. Petitioners argue (Pet. 5, 7-9, 12) that, even though they deliberately refused to register as required, their belief that conscription is morally wrong and their purpose to secure a judicial test of the Act's validity negative the element of criminal intent indispensable to valid convictions. The Court of Appeals thought the argument "scarcely deserv[ed] * * * consideration" (R. 13), and we agree. Concededly, each petitioner deliberately refused to register, well knowing he was required to do so under the Act. This, plainly, was all the "criminal intent" that was required. *Prince* v. *Massachusetts,* 321 U.S. 158, 166-167; *Browder* v. *United States,* 312 U.S. 335, 341-342; *Sinclair* v. *United States,* 279 U.S. 263, 299; *Davis* v. *Beason,* 133 U.S. 333; *Reynolds* v. *United States,* 98 U.S. 145; *Warren* v. *United States,* 177 F. 2d 596, 600 (C.A. 10), certiorari denied, 338 U.S. 947. Petitioners' reliance on *Keegan* v. *United States,* 325 U.S. 478 (Pet. 12) is misplaced. The inapplicability of the *Keegan* case to the present contention is fully discussed in our brief in opposition to certiorari in the

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the common defence" (Preamble) is not limited to the time of actual hostilities. As the court below remarked (R. 8), "If, as contended by defendants, Congress could only exercise this power to conscript and train men when the country is at war, such action might then be unavailing because it would come too late." The validity of the 1940 Selective Service Act, passed when this country was at peace, has never been questioned (see *Falbo* v. *United States,* 320 U.S. 549, 551-552, and cases cited at R. 8). And see *Warren* v. *United States,* 177 F. 2d 596, 599 (C.A. 10), certiorari denied, 338 U.S. 947, upholding the validity of the present Act as against this very contention.

Warren case, *supra* (No. 468, Oct. Term, 1949, pp. 10-13), to which we respectfully refer the Court.

3. Finally, petitioners contend (Pet. 14-15) that they in fact complied with the registration requirements of the Act by writing to their draft boards announcing their refusals to register. This unusual argument seems to be based on §§ 1613.11 and 1613.13 of the Regulations, *supra*, pp. 4-5, which provide that "All persons who present themselves for registration shall be registered on a Registration Card"; that the registrar shall fill out the card from information supplied by the registrant; and that the "registrant shall then sign his name" in the appropriate space on the card; but that "If the registrant is unable *or refuses* to sign the Registration Card * * *, the registrar shall sign such registrant's name * * *, and the act of the registrar is so doing shall have the same force and effect as if such registrant had signed the Registration Card * * *, *and such registrant shall thereby be registered*" [Italics supplied]. But petitioners were not convicted of refusing to sign registration cards; they were convicted of refusing to "present [themselves] for and submit to registration" (*supra*, p. 6). The regulations manifestly contemplate the personal appearance before the local board, of each person subject to the Act's requirements, to be registered. Petitioners made no such appearances. *United States* v. *Norton*, 179 F. 2d 527 (C.A. 2), on which petitioners rely

(Pet. 15), is therefore plainly distinguishable. Petitioners' writing of letters to the draft boards, notifying the boards of their intention to refuse to register, plainly did not constitute compliance with the duty, imposed by the Act (Section 3, *supra*, pp. 2-3), to "present [themselves] for and submit to registration."

CONCLUSION

The judgments below are correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for writs of certiorari should be denied.

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